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IN THE

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Supreme Court of the United States

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, William C. Witherspoon, petitioner-appellant in the court below, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this case.

Opinion Below

The opinion of the Supreme Court of Illinois, reported at 36 Ill. 2d 471, 224 N.E. 2d 259 (1967), is appended hereto as Appendix A.

Jurisdiction

The opinion and judgment of the Supreme Court of Illinois was entered on January 19, 1967. A petition for rehearing was denied on March 27, 1967, and the judgment became final on that date. Mr. Justice Abe Fortas has extended the time for filing this petition to July 11, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. An Illinois statute provided that the State could challenge for cause all prospective jurors who were opposed to or had conscientious scruples against capital punishment. (Ch. 38, § 743, Ill. Rev. Stat. 1959.)

The question presented is whether the courts below should have afforded petitioner an opportunity to prove the allegations of his petition that the operation of this statute deprived him of a jury which fairly represented a cross section of the community, and assured the State of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution?

2. When petitioner was tried in 1960, an Illinois statute (Ch. 38, § 801, Ill. Rev. Stat. 1959) provided that if a defendant indicted for murder (and several other "major" crimes) exercised his right to trial by jury, the jury fixed the punishment in the event the defendant was found guilty; the defendant was *not* afforded an opportunity to introduce evidence in mitigation before his punishment was fixed. If however, the defendant waived jury trial and was found guilty by the trial judge, the defendant *was* permitted to

introduce evidence in mitigation before sentence was imposed.

The question presented is whether Illinois can penalize a certain class of criminal defendants for exercising their right to trial by jury, by preventing them from introducing mitigating evidence before sentence is imposed. Or is this statutory system violative of the rights of those defendants under the Sixth and Fourteenth Amendments to the United States Constitution?

3. In the trial court, petitioner offered to prove that he has become rehabilitated since the time of his trial (1960), that capital punishment has no deterrent effect on potential murderers who do not kill for hire, and that imposition of the death penalty on petitioner at this time is repugnant to current concepts of humane justice and is therefore cruel and unusual punishment in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

The question presented is whether the courts below erred in refusing to permit petitioner to prove these allegations?

4. Were petitioner's rights under the Fourteenth Amendment to the United States Constitution violated when, in a pre-trial hearing on the admissibility of petitioner's confession, the trial judge refused to permit petitioner's counsel to ask the Assistant State's Attorney who obtained the confession whether he advised petitioner of his constitutional rights and that he had a right to talk to a lawyer before making a statement?

5. Did the courts below err in refusing to permit petitioner to prove the allegations of his petition that he has discovered a witness who can support petitioner's claim that petitioner's confession was obtained by means of physical coercion?

6. In view of the pre-trial petition filed by petitioner's counsel that they could not secure full cooperation from petitioner, were petitioner's rights under the Fourteenth Amendment violated by the trial court's failure to hold a hearing to determine whether petitioner was competent to stand trial?

7. An Illinois statute provided that if a defendant testified in his own behalf, the State could prove in rebuttal that the defendant had been convicted of "infamous crimes" (Ch. 38, § 734, Ill. Rev. Stat. 1959). Following petitioner's testimony, the State was permitted to prove that he had been convicted of a crime 11 years before.

The question presented is whether this statute imposed a penalty upon petitioner's right to testify on his own behalf, in violation of his rights under the Fourteenth Amendment to the United States Constitution?

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury of the State . . . wherein the crime shall have been committed. . . ."

The Eighth Amendment to the United States Constitution provides in pertinent part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides in part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 360 of the Illinois Criminal Code (Ch. 38, § 360, Ill. Rev. Stat. 1959) provided:

> "Whoever is guilty of murder shall suffer the punishment of death or imprisonment in the penitentiary for his natural life or for a term not less than 14 years. If the accused is found guilty by a jury they shall fix the punishment by their verdict."

Section 734 of the Illinois Criminal Code (Ch. 38, § 734, Ill. Rev. Stat. 1959) provided in part:

> "No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; . . ."

Section 743 of the Illinois Criminal Code (Ch. 38, § 743, Ill. Rev. Stat. 1959) provided:

> "In trials for murder it shall be a cause for challenge of any juror, who shall on being examined state that he has conscientious scruples against capital punishment or that he is opposed to the same."

Section 801 of the Illinois Criminal Code (Ch. 38, § 801, Ill. Rev. Stat. 1959) provided in pertinent part:

> "In all cases where any person . . . shall be charged with murder . . . and the case shall be tried by a jury and the jury shall find the defendant guilty, the jury shall also by its verdict fix the punishment . . . In all cases tried by the court without a jury, on a plea of not guilty or on a plea of guilty, for the purpose of determining the duration of imprisonment the court may, after conviction of the person, consider the evidence, if any, received upon the trial, and any other evidence offered as to aggravation and mitigation of the offense, and may also hear and receive evidence as to the moral character, life, family, occupation, and criminal record, if any, of such person so convicted."

STATEMENT

Petitioner's Arrest, Trial and Conviction

Chicago police officer Mitchell Stone was shot and killed on April 29, 1959. Petitioner Witherspoon was taken into custody several hours later. (A. 21.)* During a lengthy interrogation at police headquarters, the police failed to apprise petitioner of his right to remain silent, and rejected his request to speak with an attorney. Eventually petitioner admitted that he had shot officer Stone. (R. 164-172.)

After petitioner was indicted, he advised the trial court that he was indigent and counsel was appointed to represent him. Petitioner's counsel filed a motion requesting that petitioner be examined psychiatrically because counsel were unable to secure petitioner's full cooperation. The trial court ordered an examination of petitioner by the Cook County Behavior Clinic in order to obtain an opinion as to his competency to stand trial. (R. 57.) However, no hearing on this issue was held by the Court.

Prior to trial, petitioner moved to suppress his confession on the ground that it was obtained through mental and physical coercion. (R. 27.) During the course of the hearing on the motion, petitioner's counsel attempted to prove that the police did not advise petitioner of his right to remain silent and to consult with a lawyer, but the trial court sustained objections to this line of inquiry, apparently on the ground that these subjects were irrelevant. (R. 353, 361.) The motion to suppress the confession was denied. (R. 613.)

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* "R." refers to the transcript of petitioner's trial, found in Volumes I, II and III. "A." refers to the printed abstract filed in the Illinois Supreme Court on petitioner's original appeal. "Abst." refers to the printed abstract filed in the Illinois Supreme Court in the instant case, found in Volume IV, p. 306.

Under Illinois law at the time petitioner was tried, a defendant who was found guilty of a crime had the right to introduce evidence in mitigation before being sentenced by the trial judge. The Illinois Criminal Code provided, however, that in cases involving a charge of murder and several other "major" crimes, the jury fixed the penalty. (Ch. 38, § 801, Ill. Rev. Stat. 1959.) Accordingly, defendants such as petitioner who exercised their right to jury trial were required to forego their right to introduce mitigating evidence in the event of a guilty verdict.

Another Illinois statute which was in force at the time of petitioner's trial authorized the State to excuse for cause all prospective jurors who admitted that they had conscientious scruples against the imposition of the death penalty. (Ch. 38, § 743, Ill. Rev. Stat. 1959.) Nearly fifty percent of the jurors questioned were excused for cause on this ground. (R. 636-1018.)

During the trial, petitioner's confession and admissions were introduced into evidence over defense objections. (A. 43-44.) Petitioner testified that he had shot officer Stone accidentally. (A. 126-127.)

On April 22, 1960 the jury returned its verdict finding petitioner guilty of murder and fixing his punishment at death. (A. 220.) Petitioner was never afforded an opportunity of introducing mitigating evidence with respect to the penalty to be imposed on him.

Petitioner's Direct Appeal

After petitioner's conviction, his court-appointed counsel was granted leave to withdraw, and the Supreme Court of Illinois appointed new counsel to represent him on appeal. Petitioner's new counsel argued in the Supreme Court of Illinois that the trial court had committed prejudicial error

in admitting evidence of prior crimes, and that the trial court's conduct and comments throughout the trial indicated prejudice and constituted reversible error. Without consultation with petitioner, however, the constitutional issues which had been raised at trial and many of the trial errors were not tendered or urged by appellate counsel. The Illinois Supreme Court held that at least one of the rulings attacked on appeal was error, but that the error was not prejudicial. The Supreme Court affirmed the conviction on March 3, 1963, and rehearing was denied on May 22, 1963. *People* v. *Witherspoon,* 27 Ill. 2d 483 (1963).

Counsel who had been appointed for petitioner in the Illinois Supreme Court withdrew and declined to represent petitioner further. Petitioner then applied to this Court for appointment of counsel to prepare a petition for writ of certiorari, but he was advised that this Court did not appoint counsel on such petitions. Eventually, on September 11, 1963 the Supreme Court of Illinois appointed new counsel, but by then it was too late to apply for certiorari to this Court. (Abst. 13.)

Petitioner's Prior Collateral Attacks on the Conviction

On October 9, 1963, petitioner's third appointed counsel filed a petition for writ of habeas corpus in the United States District Court. The court denied the petition without prejudice on the ground that petitioner had not exhausted his state court remedies.

Petitioner thereupon filed two actions in the state courts, (i) a motion for leave to file an original petition for writ of habeas corpus in the Supreme Court of Illinois (denied on November 15, 1963) and (ii) a petition in the trial court under the Illinois Post-Conviction Hearing Act (Ch.

8, §§ 826-832, Ill. Rev. Stat. 1963). The latter petition as dismissed by the trial court on the ground that the oints raised in the petition were raised or could have een raised in the original appeal to the Supreme Court f Illinois and were therefore barred by the doctrines of *es judicata* or waiver. A petition for writ of error was enied by the Supreme Court of Illinois in an unreported pinion, the Court holding that the post conviction peti- on was barred by *res judicata* and waiver as the trial ourt had ruled. *People* v. *Witherspoon*, Ill. Sup. Ct. No. 559 (Jan. 17, 1964).

Thereafter, petitioner's previously dismissed petition for rit of habeas corpus in the federal District Court was einstated, and an amended petition was filed. No hearing as held but briefs were received concerning two legal sues, namely (1) whether the trial court had erroneously structed the jury as to the admissibility of petitioner's onfession, and (2) whether Section 801 of the Illinois riminal Code violates the United States Constitution by ermitting the jury to fix the penalty in murder cases, thus epriving convicted defendants of the right to present evi- ence in mitigation. The District Court ruled that the ial judge had properly instructed the jury as to peti- oner's confession, but that the procedure by which the ry fixed the penalty was unconstitutional. The District ourt ordered the sentence of death vacated and petitioner turned to the Criminal Court of Cook County to be ven an opportunity to introduce evidence in mitigation efore sentence was re-imposed. Both parties appealed. he United States Court of Appeals for the Seventh Cir- it affirmed the District Court ruling as to the confession, t reversed the ruling that Section 801 of the Illinois riminal Code was unconstitutional and remanded the

cause with directions to dismiss the petition for writ of habeas corpus. *United States ex rel. Witherspoon* v. *Ogilvie,* 337 F. 2d 427 (7th Cir. 1964). This Court denied certiorari. 379 U.S. 950.

Petitioner then filed another petition for writ of habeas corpus in the federal District Court. New counsel were appointed to represent him. In February, 1965 the District Court entered an order staying further proceeding until petitioner had exhausted all available remedies in the Illinois courts.

Present Proceedings

Petitioner then filed a new petition in the state court. The allegations of the petition are discussed under the appropriate subheadings of the "Reasons for Granting the Writ." The State took issue with many of the factual averments of the petition. (A. 19-50.) The State moved to strike the petition on the grounds of *res judicata,* waiver and lack of subject matter jurisdiction. Petitioner filed a reply in which he requested an opportunity to adduce proof in support of the contested portions of his pleadings. (A. 50-60.) The trial court denied petitioner's request to introduce evidence in support of his pleadings, and dismissed the petition, as amended, on the ground that the facts set forth in the petition, taken as true, were insufficient to warrant the relief requested because (a) some of the issues presented had been ruled upon previously in earlier proceedings and were *res judicata,* and (b) the issues not previously raised failed to constitute a substantial deprivation of Witherspoon's constitutional rights. (A. 60, 62-64, 69.)

The Supreme Court of Illinois affirmed the trial court's dismissal of the petition. Rehearing was denied March 27, 1967. A copy of the Court's opinion is reproduced as Appendix A.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS A NOVEL AND SUBSTANTIAL QUESTION AS TO DISQUALIFICATION FOR CAUSE OF VENIREMEN HAVING SCRUPLES AGAINST IMPOSITION OF THE DEATH PENALTY.

At the time of petitioner's trial, an Illinois statute provided that the State could challenge for cause any prospective juror who "has conscientious scruples against capital punishment, or . . . is opposed to the same." (Ch. 38, § 743, Ill. Rev. Stat. 1959.) This statute resulted in the disqualification of almost 50% of the veniremen at petitioner's trial.

Petitioner attacked this statute on the ground that it violates the Due Process Clause, in that (1) it excluded for cause a substantial segment of the community and thus deprived him of his right to be tried by a jury which is fairly representative of the entire community, and (2) it deprived him of a fair jury because persons who lack scruples against imposition of the death penalty are "prosecution prone" on the issue of guilt or innocence.*

Petitioner also attacked this statute on the ground that it violates the Equal Protection Clause, in that it singles out for unequal and inferior treatment—trial by a non-representative, prosecution prone jury—defendants accused of certain crimes, and then only if the state decides to qualify the jury for imposition of the death penalty. This is an arbitrary and capricious distinction having no basis in reason.

* Petitioner offered to prove this by expert testimony.

Challenge for cause of jurors having scruples against the death penalty originated in cases in which the death penalty was mandatory. See, *e.g.*, *U. S.* v. *Cornell*, 25 Fed. Cas. 650, 655-6, 2 Mason 91 (1819). But the reason for this rule does not exist when the death penalty is not required. By permitting the State to challenge for cause on the basis of scruples against capital punishment, Illinois guarantees a prosecution-oriented jury, whose views fail to reflect a large and important portion of the community.

We realize that three federal Courts of Appeal* concur with the Illinois Supreme Court that the Illinois statute is valid. However, the reasoning of these cases depends upon the proposition that the elimination of jurors who oppose the death penalty does *not* create a "prosecution prone" jury. In the instant case, petitioner offered to prove, by competent scientific evidence that death qualified jurors *are* partial to the prosecution on the issue of guilt or innocence. Numerous studies made in recent years support these allegations.* Assuming, as the Court must on this record, that the application of Section 743 of the Illinois Criminal Code did in fact result in petitioner being

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* *U. S.* v. *Puff*, 211 F.2d 171 (2d Cir. 1954); *Turberville* v. *U. S.*, 303 F.2d 411 (D.C. Cir. 1962); *Pope* v. *U. S.*, 372 F.2d 710 (8th Cir. 1967); see also *U. S. ex rel. Dukes* v. *Sain*, 297 F.2d 799 (7th Cir. 1962), cert. denied 369 U.S. 868.

* Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt," 39 Tex. L. Rev. 545 (1961); Wilson, "Belief in Capital Punishment and Jury Performance," The Texas Observer, Nov. 27, 1964, p. 5; Zeisel, "Some Insights Into the Operation of Criminal Juries," (1957); Crosson, "An Investigation Into Certain Personality Variables Among Capital Trial Jurors" (Doctoral Dissertation, Western Reserve University, 1966).

tried by a prosecution prone jury, it is clear that his rights under the Sixth and Fourteenth Amendments were violated.

Petitioner is entitled under the Sixth Amendment, through the Fourteenth, to be tried by "an impartial jury of the State, . . . wherein the crime shall have been committed." *Parker* v. *Gladden*, 87 S.Ct. 468, 470 (1966).

In *Fay* v. *New York*, 332 U.S. 261, 285-6 (1947), this Court observed that a jury "organized to convict" is subject to constitutional challenge. Petitioner was not permitted to establish that the jury which tried him was "organized to convict."

The Illinois courts erred in refusing to afford petitioner the opportunity to prove the allegations of his post-conviction petition by competent evidence. This Court has never ruled on this novel and substantial federal question as to the widespread practice of challenging for cause veniremen who have scruples concerning the death penalty.

II.

THIS CASE PRESENTS A NOVEL QUESTION AS TO THE VALIDITY OF AN ILLINOIS STATUTE WHICH PENALIZED PETITIONER FOR EXERCISING HIS RIGHT TO TRIAL BY JURY.

When petitioner was tried, Illinois law provided that if a defendant indicted for murder waived trial by jury and was thereafter found guilty, he was entitled to introduce evidence in mitigation before being sentenced by the trial judge; but if the defendant exercised his right to jury trial and was found guilty, the jury also fixed the punishment. (Ch. 38, § 801, Ill. Rev. Stat. 1959.)

Thus, the defendant was required to forego the opportunity to introduce mitigating evidence as the price of a jury trial.*

Due process of law includes an opportunity to introduce evidence on all issues to be determined. *In Re Oliver,* 333 U.S. 257, 273 (1948). One of the most important issues in a criminal trial is the fixing of punishment. The sentencing stage of a criminal trial must meet the standards of the Due Process Clause. *Townsend* v. *Burke,* 334 U.S. 736, 741 (1948). Yet, under the statute here involved, the defendant is prohibited from adducing evidence relevant to the sentence to be imposed solely because he exercised his right to trial by jury.

Petitioner's right to jury trial emanates from the United States Constitution. *Parker* v. *Gladden,* 87 S.Ct. 468, 470 (1966). In *Griffin* v. *California,* 380 U.S. 609 (1965), this Court struck down the practice of the prosecutor commenting on defendant's failure to testify because, ". . . it is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly . . ." (380 U.S. at 614.) So too, deprivation of an opportunity to introduce mitigating evidence is a penalty for exercising a constitutional privilege, and seriously detracts from the privilege.

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* While the defendant may theoretically introduce some mitigating evidence before the jury during the trial, the Illinois Supreme Court has recognized that the kind and nature of the evidence which would be so introduced is extremely limited as compared to that which is available at a separate hearing. *People* v. *Spann,* 20 Ill. 2d 338, 343 (1960). Moreover, there is a substantial inconsistency between evidence in mitigation and the assertion of innocence, so that the defendant who pleads not guilty can not, as a practical matter, adduce any significant evidence in mitigation.

Closely analogous is *U. S.* v. *Jackson*, 262 F. Supp. 716 (D. Conn. 1967), in which the court held unconstitutional a portion of 18 U.S.C. § 1201(a) because the statute provides for imposition of the death penalty only upon a jury recommendation (262 F. Supp. at 717-18):

> "If defendants claim their fundamental Sixth Amendment right to trial by jury, therefore, they must risk their lives. That risk is at least substantially reduced if defendants waive their constitutional right to jury trial by claiming trial to the court or by pleading guilty. . . . If defendants waive jury trial or plead guilty, therefore, they may thus gain immunity from capital punishment; if they assert their constitutional right to jury trial, however, the price for assertion of such constitutional right is the risk of death.
>
> "The Supreme Court of the United States recently reversed a state conviction of a capital offense because comment on the failure of the accused to testify had penalized and made costly the assertion of the Fifth Amendment right to silence. Assertion of the equally fundamental right to trial by jury is made no less costly for these defendants by the very terms of the statute which defines the offense with which they are charged.
>
> "This Court therefore holds that 18 U.S.C. §1201(a), to the extent that it impairs defendants' free exercise of their right to trial by jury, violates the Sixth Amendment to the Constitution of the United States and is invalid."

So too in Illinois, defendants were restrained in exercising their right to jury trial because they thereby forfeited the opportunity to introduce mitigating evidence in the event they were found guilty.

The issue raised by this branch of the case has never been addressed by this Court. In *Frady* v. *U. S.*, 348 F.2d 84 (D.C. Cir. 1965), it was said (348 F.2d at 98, concurring opinion):

> " . . . Serious questions of constitutionality under the due process clause would surely arise from any attempt, limited to capital cases, to deprive a defendant of the opportunity to inform the court or the jury with respect to its sentencing function."

We respectfully submit that this Court should grant the petition and thereafter determine the merits of this important federal question.

III.

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER IMPOSITION OF THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT.

In the trial court, petitioner alleged and offered to prove the following allegations (Abst. 6-9):

(1) Petitioner has been substantially rehabilitated, and is psychologically and morally a different person from the defendant who was sentenced to death in 1960.

(2) Modern scientific knowledge in the fields of psychology, sociology and criminology demonstrate that capital punishment has no deterrent effect or other redeeming social benefit, and fails to fulfill any of the legally acceptable purposes of punishment.

(3) The penalty of death is disproportionately cruel punishment for the crime of murder, when not committed for hire or other direct economic gain, and has no deterrent effect on murders not for hire or other direct economic benefit.

(4) Under these circumstances, imposition of the death penalty upon the petitioner is repugnant to current concepts of humane justice and constitutes cruel and unusual punishment in violation of petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution.

Although the State's motion to dismiss admitted these allegations, the trial court dismissed the petition without hearing.

Petitioner contends that he should be afforded an opportunity to adduce proof in support of his claims.*

If petitioner is able to establish the allegations set forth above, we submit that executing him would run afoul of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

The concept of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States,* 217 U.S. 349, 378 (1910). Likewise, the Due Process Clause "is not confined within a permanent catalogue of what may at a given time be deemed the limit or the essentials of fundamental rights . . . " *Wolf* v. *Colorado,* 338 U.S. 25, 27 (1949).

One of the major factors which contributes to the evolution of constitutional standards is the development of scientific knowledge and understanding. The importance of advanced scientific evidence in solving constitutional questions was recognized, for example, in *Brown* v. *Board of Education,* 347 U.S. 483, 499 (1954) (psychological evidence of effect of school segregation on Negro children), and in *Robinson* v. *California,* 370 U.S. 660 (1962) (medical aspects of drug addiction considered under the Cruel and Unusual Punishment Clause).

This Court has recognized that "deterrence and reformation" are the proper objectives of punishment, rather than "retaliation and vengeance." *Morrissette* v. *U.S.*, 342 U.S. 246, 251 (1952); see also *Williams* v. *New York,*

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* Although this contention was fully presented in the trial court and briefed on appeal, no mention is made of it in the opinion of the Illinois Supreme Court.

337 U.S. 241, 248 (1949); *Trop* v. *Dulles*, 356 U.S. 86, 111 (1958) (concurring opinion of Mr. Justice Brennan). Execution of a rehabilitated defendant, particularly where no deterrence is achieved, shocks the conscience and violates fundamental notions of decency.

The petition also alleges (and the allegations stand admitted) that petitioner has been frequently subjected to severe psychological torture by the repeated settings and postponements of the date of his execution, including several last minute reprieves. These allegations pose the question of whether the State action in repeatedly fixing specific dates for execution during the pendency of the condemned defendant's litigation constitutes cruel and unuusal punishment in violation of the Eighth Amendment to the United States Constitution. Compare *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947).

In *Rudolph* v. *Alabama*, 375 U.S. 889 (1963) three Justices of this Court felt that the court should consider a substantially identical issue without the aid of scientific evidence. Here petitioner does not seek to have these important legal and social issues decided in an evidentiary vacuum; he seeks only the opportunity to adduce the relevant evidence so that these issues may properly be considered.

The courts below should have afforded petitioner an opportunity to establish the factual allegations set forth above upon which he predicates his attack upon imposition of the death penalty at this time.

The issue tendered, which the Illinois Supreme Court chose to overlook, presents a most serious and unique constitutional issue.

IV.

THIS CASE PRESENTS THE QUESTION OF WHETHER PETITIONER WAS ERRONEOUSLY PREVENTED FROM ESTABLISHING THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED IN CONNECTION WITH HIS CONFESSION.

In the pre-trial hearing respecting the admissibility of petitioner's confession, the trial judge sustained the State's objections to the following questions put to the Assistant State's Attorney who took the confession (R. 353, 361):

> "Q. Did you, in this case, sir, advise the defendant of his constitutional rights?
>
> * * *
>
> "Q. Did you tell the defendant he had a right to talk to a lawyer before taking a statement?"

The Illinois Supreme Court approved these rulings on the ground that petitioner's trial preceded this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This was a clearly erroneous ruling. In *Davis* v. *North Carolina*, 384 U.S. 737, 740-1 (1966), this Court said:

> "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by those decisions. On the contrary, that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made . . . "

In ruling that petitioner's confession was admissible, the trial judge excluded relevant evidence. This case presents the important issue of what remedy should be afforded defendants in pre-*Miranda* cases whose confessions were admitted under an erroneous standard like that used in petitioner's case.

V.

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER ILLINOIS IS REQUIRED TO GRANT PETITIONER A HEARING RESPECTING NEWLY DISCOVERED EVIDENCE AS TO THE VOLUNTARINESS OF HIS CONFESSION.

Petitioner's verified petition alleges that, subsequent to the time of his trial and conviction, "petitioner has discovered the existence of additional evidence to support his contention that his confession and admissions were not voluntary, but rather were the result of a physical and mental coercion brought to bear on petitioner by the police," to wit, "a witness who observed petitioner when he was in the police station, and who can testify to petitioner's physical condition at that time." (Abst. 10.) Petitioner requested a new hearing on the issue of voluntariness of his confession, or in the alternative an opportunity to present the testimony of the witness so that the trial court could determine whether or not the testimony of that witness would justify a complete rehearing on the voluntariness of his confession. The trial court dismissed the petition, and the Supreme Court of Illinois affirmed on the grounds that *new trials* will be granted on the ground of newly discovered evidence only if it appears that the evidence is of such conclusive character that it will probably change the result, and that "the allegations of newly discovered evidence tell nothing about the evidence, and do not suggest that it will be 'conclusive and not merely cumulative' or that 'it will probably change the result if a new trial is granted.'" (Appendix A, pp. 6-7.) Thus, petitioner was denied the opportunity to present the new evidence so that its significance could be realistically appraised.

The issue presented here is whether the Due Process Clause requires the states to provide convicted defendants a hearing respecting substantial claims of violation of their federal constitutional rights.* Mr. Justice Brennan suggests in *Case* v. *Nebraska,* 381 U.S. 336, 344-47 (1965), that the sharp increase in the number of federal habeas corpus petitions and the resulting friction between state and federal courts can be ameliorated only by a forthright holding that the state must provide a collateral remedy which allows the prisoner a full and fair factual hearing on his constitutional claims. See also *Henry* v. *Mississippi,* 379 U.S. 443, 452-453 (1965). Good sense, and the Due Process Clause, require nothing less.

This important question should be resolved by this Court.

VI.

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S FAILURE TO HOLD A HEARING TO DETERMINE HIS COMPETENCY TO STAND TRIAL.

Prior to trial, petitioner's counsel filed a petition seeking to have petitioner examined by the Cook County Behavior Clinic "for the reason that [petitioner's] at-

* The test as to whether a federal district court must grant such a hearing to a state-convicted petitioner is set forth in *Townsend* v. *Sain,* 372 U.S. 293, 312-18 (1963). See also 28 U.S.C. § 2254.

torneys have been unable to secure the full cooperation of [petitioner].'"* (R. 57.)

Despite the allegation that petitioner was unable to cooperate with counsel, the trial court failed to conduct a hearing to determine his competency to stand trial.

One who is mentally incapable of cooperating with counsel is incompetent to stand trial, and the law is settled that the conviction of an accused person while he is legally incompetent violates due process. *Pate* v. *Robinson,* 383 U.S. 375, 378 (1966).

Under Illinois law, the issue of competency to stand trial is determined by a jury. The trial judge has no discretion to decide the issue himself. If a *bona fide* question of the defendant's competency to stand trial is raised, the trial judge must empanel a jury to decide the issue at the request of either party, or, if no specific request is made, *sua sponte*. *People* v. *Burson,* 11 Ill.2d 360, 368, 370 (1957); *Brown* v. *People,* 8 Ill.2d 540, 545 (1956). The Due Process Clause requires Illinois trial court judges to grant such a hearing "[W]here the evidence raises a '*bona fide* doubt' as to a defendant's competence to stand trial . . ." *Pate* v. *Robinson,* 383 U.S. 375, 385-86 (1966).

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* A Behavior Clinic examination was apparently had, but there is a dispute as to whether it was transmitted to the trial court or filed with the Clerk. During the hearings on the present post-conviction petition, counsel for the State sought leave to file a Behavior Clinic report and letter of transmittal dated February 10, 1960. Since the trial court's records contained no reference to the filing of such a report, petitioner's counsel objected to its being filed in 1965, and sought leave to prove that the certification of filing in 1960 was in error. The trial court resolved the issue by permitting the report to be filed with the understanding that it would not be considered in disposing of the post-conviction petition, thus rendering moot the dispute as to whether it had ever before been filed. (Abst. 68.)

The Supreme Court of Illinois committed double error y relying upon the report of the Cook County Behavior linic to excuse the failure to hold a sanity hearing. In ie first place, the judge who heard the present post-con- ction petition specifically indicated that he would not onsider the Behavior Clinic report, and on that basis de- ied petitioner an opportunity to show that it was never led with the trial court in the original case. (Abst. 68.) lore important, the Cook County Behavior Clinic is not mpowered to "try" the issue of competency to stand ial. That duty falls upon a jury, duly empaneled to de- de the issue. The original trial court's failure to afford etitioner a hearing cannot be excused because an em- loyee of the Behavior Clinic thought he was competent. is counsel alleged that he was not, and the purpose of a anity hearing is to resolve such a dispute in accordance ith due process of law. By failing to hold such a hear- g, Illinois den ed petitioner due process of law.

VII.

SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER ILLINOIS WRONGFULLY PENALIZED PETITIONER FOR TESTIFYING BY PERMITTING THE STATE TO PROVE PRIOR CONVICTIONS IN REBUTTAL.

Illinois law provides that if a defendant in a criminal ase testifies in his own behalf, the state may prove in re- uttal prior convictions of the defendant of "infamous rimes" for the purpose of reflecting on the defendant's redibility. (Ch. 38, § 734, Ill. Rev. Stat. 1959.)

In the courts below, petitioner attacked this law on the round that introduction of an 11-year old conviction at

his trial violated his rights under the Due Process Clause.* Here again, Illinois penalized the defendant for exercising his constitutional right to testify in his own behalf. Introduction of the prior conviction, which has no reasonable bearing upon defendant's credibility, and which is actually treated by the jury as evidence that the defendant committed the crime for which he is on trial, is the obverse of the practice which was held unconstitutional in *Griffin* v. *California*, 380 U.S. 609 (1965).

This Court's recent decision in *Spencer* v. *Texas*, 87 S.Ct. 648 (1967), does not address the issue presented here. Under the procedure involved there, the government proved the prior conviction as part of its case in chief. Here, however, the past convictions are established only if and after the defendant takes the stand.

This Court should grant defendant's petition to resolve the issue of the validity of this widespread but fundamentally unfair procedure.

CONCLUSION

Petitioner earnestly prays that this court issue its writ of certiorari to the Supreme Court of Illinois to review the substantial federal questions raised herein.

Respectfully submitted,

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July 11, 1967

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* Although this contention was fully argued to the Supreme Court of Illinois, it is not mentioned in the court's opinion.

APPENDIX A

Opinion of the Supreme Court of Illinois

MR. JUSTICE SCHAEFER delivered the opinion of the court:

In April of 1960, a jury convicted the petitioner, William C. Witherspoon, of the murder of police officer Mitchell Stone, and fixed his penalty at death. The judgment was affirmed on writ of error. (*People* v. *Witherspoon,* (1963) 27 Ill.2d 483.) Thereafter the petitioner filed a petition for relief under the Post-Conviction Hearing Act. (Ill. Rev. Stat. 1963, chap. 38, pars. 826-832.) The trial court granted the State's motion to dismiss the petition on the ground that some of the claims asserted had been adjudicated and that others had been waived because they were not raised on the writ of error to review the judgment of conviction. In a memorandum opinion (No. 3559) this court denied writ of error, deciding some of the claims asserted adversely to the petitioner and holding that others had either been adjudicated or waived.

The petitioner has also sought relief by way of Federal *habeas corpus.* In *United States ex rel. Witherspoon* v. *Ogilvie,* (7th cir. 1964) 337 F.2d 427, the court of appeals reversed a determination by a district judge that the petitioner was entitled to be resentenced after being given an opportunity to present evidence in mitigation. The court of appeals also considered other claims advanced by the petitioner, and ordered the *habeas corpus* petition dismissed. Thereafter another *habeas corpus* proceeding was instituted by the petitioner in the United States District Court. The district judge stayed proceedings in that court until remedies in the State courts had been exhausted.

The attorneys appointed by the district court to represent the petitioner in the *habeas corpus* proceeding then filed in the circuit court of Cook County a petition which requested that it be considered under whatever form of remedy is "provided for by Illinois law", suggesting a petition under the Post-Conviction Hearing Act, (Ill. Rev. Stat. 1965, chap 38, pars. 122—1 to 122—7); *habeas corpus;* section 772 of the Civil Practice Act, (Ill. Rev. Stat. 1965, chap. 110, par. 72); a bill of review; a bill in the nature of a bill of review; *coram nobis; coram vobis; audita querela,* or any other appropriate remedy. After extended argument the trial judge dismissed the petition on his own motion on the ground that it failed to set forth facts sufficient to entitle the petitioner to relief. This appeal follows.

In his two prior appeals to this court and his appeal to the Court of Appeals for the Seventh Circuit numerous alleged trial errors have been considered. We need not now consider whether there may be situations in which a showing of innocence may be made by a defendant who has already resorted to direct and collateral review, as has the defendant in this case. (See *Anderson* v. *Gladden,* 234 Ore. 614, 383 P.2d 986, 991; *In re Sterling,* 63 Cal.2d 486, 407 P.2d 5, 7) Most of the petitioner's contentions have been raised previously and decided adversely, and the remaining contentions do not show any error that would affect the accuracy of the determination of the petitioner's guilt, or the fundamental fairness of his trial.

In his present petition the petitioner alleges, for the first time, that he was not advised of his right to remain silent or of his right to confer with counsel, and that his request to confer with counsel before making a statement was denied. In *Johnson* v. *New Jersey,* 384 U.S. 719, 16 L. Ed 2d 882, the Supreme Court held that the principles of

Escobedo v. *Illinois*, 378 U.S. 478, 12 L. Ed.2d 977, and the procedures required by *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed.2d 694, applied only prospectively. In *People* v. *McGuire*, 35 Ill.2d 219, *People* v. *Wallace*, 35 Ill.2d 251, and other cases, we have refused to apply those principles retroactively. Since this defendant was tried in 1960, *Escobedo* and *Miranda* do not apply.

The petitioner contends that the confession which was admitted in evidence against him was not voluntary. No such contention was advanced upon the direct review of the petitioner's conviction, which is reported in 27 Ill.2d 483. Such a claim was advanced in his first post-conviction petition, and in affirming the judgment dismissing that petition this court held that the contention had been waived. The petitioner now asserts that he did not knowingly waive this contention and did not authorize the attorney who represented him to do so, and he argues, therefore, that under the doctrine of *Fay* v. *Noia*, 372 U.S. 391, 9 L. Ed.2d 837, there was no effective waiver of this contention. The petitioner's present petition alleges with respect to the direct review of his conviction: "On one occasion, petitioner's court appointed counsel wrote petitioner a letter advising petitioner of the grounds which counsel intended to raise on the appeal, but counsel did not offer or permit petitioner to determine what should be argued and what should not be argued on the appeal."

This allegation is hardly consistent with the petitioner's assertion that there was no knowing waiver upon direct review. In any event, the contention that his confession was coerced was advanced in his petition for *habeas corpus* in the Federal court. Upon appeal in that case, the Court of Appeals pointed out that a full hearing had been held upon the petitioner's motion to suppress prior to the trial, and that the trial court had found the confession to have

been voluntary. The Court of Appeals then held that the District Court was not required to conduct an evidentiary hearing, and stated that "the record fairly supports the state factual determination." 337 F.2d at 430; *cert.* den. 379 U.S. 950.

Petitioner contends, for the first time, that the disqualification for cause of jurors having scruples against capital punishment violated his right to a trial by a jury which was fairly representative of a cross section of the community, and subjected him to trial by a jury which favored the prosecution in deciding the issue of guilt or innocence. Prospective jurors at petitioner's trial were asked: "Do you have any conscientious scruples or any religious scruples against the infliction of the death penalty in a proper case?" And other prospective jurors were asked: "Now, if you're selected as one of the twelve jurors and it should be your opinion, along with the other eleven jurors, after having heard all the evidence and the rules of law given by His Honor and you're back in the jury room, it should be your opinion, along with the other eleven, that the defendant is guilty, and the next part of your deliberation is to fix a penalty, and when you're at the penalty part of the deliberations it should be your opinion, along with the other eleven jurors, that the proper verdict in this case is that of death in the chair, based on the evidence as you have heard it here and the rules of law given by his Honor, would you so say by signing a guilty verdict?"

Petitioner's contentions in this respect are foreclosed by our opinion in *People* v. *Hobbs*, 35 Ill.2d 263. *Hobbs* states that a defendant's right to trial before a jury which is a cross section of the community does not include the "right to have some individuals on the jury who may be prejudiced in his favor, someone who is unalterably opposed to one o

the possible penalties with which he is faced." (35 Ill.2d at 272). *Hobbs* also answers the petitioner's contention that a death-qualified jury is likely to favor the prosecution on the issue of guilt or innocence. In *Hobbs* the court quoted the following language from *Tuberville* v. *United States*, 112 App. D.C. 400, 303 F.2d 411, (*cert.* denied 370 U.S. 946, 8 L. Ed.2d 813, 82 S. Ct. 1596): "Being not opposed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment." (35 Ill.2d at 273.)

Nor are we persuaded to disallow challenges based on scruples because a study cited in the petitioner's brief indicates that some jurors qualified for the death penalty tend to favor the prosecution, or, as it is said, to be "prosecution prone." Since the same study indicates that jurors with scruples against the death penalty could be characterized as "defense prone", it is appropriate to continue to allow each side to challenge jurors for cause, and we adhere to the system in which each side is allowed to examine jurors and eliminate those who can not be impartial.

Petitioner contends, for the first time, that he was not afforded a hearing to determine his mental capacity to stand trial. His petition alleges that "facts were called to the attention of the trial judge which gave rise to a reasonable issue as to petitioner's mental capacity to stand trial. The obligation thereupon devolved upon the trial judge to hold an inquiry into that issue." The facts referred to are not stated, however. Upon these allegations we are unable to say that the trial judge erred in failing to hold a hearing. And any doubt concerning petitioner's mental capacity to stand trial is dispelled by the fact that he was examined by

the Behavior Clinic of the Criminal Court of Cook County, which reported that "psychological examination revealed an I.Q. of 111, indicating bright normal intelligence", and that "he knows the nature of the charge and is able to cooperate with his counsel."

Petitioner also objects that at the hearing on the present petition his attorney was not allowed to question the clerk of the court about his certification that the Clinic's report was filed on February 10, 1960. We can not say that denial of such an examination was error. The Clinic's report and an accompanying letter of transmittal from the examining physician to the trial judge indicate that the examination was reported to the trial court on February 10, 1960. The issue upon which the petitioner sought to question the clerk was whether or not these documents were stamped by the clerk of the court as filed on February 10, 1960, or at a later date. That issue was not significant. The petitioner did not allege that no examination was conducted.

The petitioner argues that he should have been allowed to introduce newly discovered evidence at the hearing below. He there alleged that since May of 1963 " * * * petitioner has discovered the existence of additional evidence to support his contention that his confession and admissions were not voluntary, but rather were the result of physical and mental coercion brought to bear on petitioner by the police. Petitioner requests an opportunity to introduce the testimony of a witness who observed petitioner when he was in the police station, and who can testify to petitioner's physical condition at that time."

We have held that "Applications for new trials on the ground of newly discovered evidence are not regarded with favor and must be closely scrutinized. In order to justify a new trial the newly discovered testimony must be cor

clusive and not merely cumulative, and the evidence must appear to be of such conclusive character that it will probably change the result if a new trial is granted." (*People* v. *Dukes,* 19 Ill.2d 532, 538-39.) Prior to trial the petitioner was afforded a hearing on his motion to suppress his confession as involuntary. Several hundred pages of the record are devoted to testimony concerning petitioner's condition and treatment during and prior to the time he made his statement. The allegations of newly discovered evidence tell nothing about the evidence, and do not suggest that it will be "conclusive and not merely cumulative" or that "it will probably change the result if a new trial is granted." The petition did not justify the request for leave to offer additional testimony.

The judgment of the circuit court of Cook County is affirmed. The clerk of this court is directed to enter an order fixing Friday, April 21, 1967, as the date on which the original sentence of the criminal court of Cook County shall be executed. A certified copy of the order shall be furnished by the clerk of this court to the Sheriff of Cook County.

Judgment affirmed.

MR. JUSTICE WARD took no part in the consideration or decision of this case.